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**TESTIMONY OF KRISTIE LEFF, ESQ.
IN SUPPORT OF RAISED BILL NO. 6662
AN ACT CONCERNING RECOUPMENT OF MONEYS OWED TO A
UNIT OWNERS' ASSOCIATION DUE TO NONPAYMENT OF ASSESSMENTS**

The collection of monthly common charge assessments is vital to the effective operation and economic stability of condominium associations. The legislature recognized this in 1984 when it enacted the Common Interest Ownership Act. Section 47-258 of that Act allows condominium associations to foreclose when a unit owner does not pay common charges. Section 47-258(b) currently provides that the association's lien had a priority to the extent of six months of common charges over the first or second mortgage.

Since 1984 when the Common Interest Ownership Act was first adopted, this scheme has operated effectively because it strikes an equitable balance between the needs of the condo associations and the needs of the banks.

Recently, however, certain big banks have set out to weaken this six-month priority lien. My law firm represents condominium associations throughout the state. In the past year or so we have seen an influx of challenges to the six-month priority scheme being lodged in courts throughout the state. This past November, one superior court decision agreed with the bank challenge and found that the six-month priority lien does not exist in instances when a bank foreclosure action and a second condominium foreclosure action are simultaneously pending. I have attached that memorandum of decision to my written testimony. (See Exhibit A).

The effect of this decision is that a condominium would either have to wait until a bank foreclosure is completed before it can assert its six-month priority lien, or the association would have to foreclose on the unit subject to the mortgage. Because bank foreclosure actions can take years to complete due to paperwork glitches and mandatory mediation requirements, the condo association will lose all the common fee revenue from that unit until the bank action is completed, and then be limited to recovering only 6 months worth of common fees. Or, if the association forecloses on the unit subject to the mortgage it has to make mortgage payments on a unit that may be worth less than what the bank is owed.

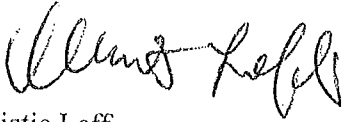
Either way, this court decision has now turned a statute that was meant to protect condominium associations into one that protects banks and forces the associations to be caretakers of the bank's collateral. Effectively, the association is forced to forego common fees on the unit to subsidize the banks.

I am in support of HB 6662 because increasing the priority lien from six months to twelve months would allow the association to recoup a greater share of its lost revenue in situations where the association has to wait until a bank foreclosure is completed.

Alternatively, I have attached to my written testimony a proposed change to the statutory language whereby the six month lien is unchanged but the language clarifies that the six month priority lien may be asserted by the association in each and every action it brings to foreclose for unpaid common charges. (See Exhibit B). This language addresses the specific challenges condominium associations are encountering in the courts.

This proposed language restores the status quo regarding the way these foreclosure actions have been handled since 1984 and preserves the intent of the statute which is to protect the financial stability of condominium associations.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Kristie Leff".

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EXHIBIT A

No. NNH-CV-11-6021568-S : SUPERIOR COURT
LAKE RIDGE CONDOMINIUM : JUDICIAL DISTRICT OF NEW HAVEN
ASSOCIATION, INC.
V. : AT NEW HAVEN
HARRY VEGA, JR., ET AL : NOVEMBER 30, 2012

**RULING ON
MOTION FOR SUMMARY JUDGMENT AND
CROSS MOTION FOR SUMMARY JUDGMENT (# 124.00 & 130.00)**

On June 8, 2011, the plaintiff, Lake Ridge Condominium Association, Inc. (Lake Ridge) commenced this action against the defendants, Harry Vega (Vega), the homeowner, and Bank of America, National Association as successor by merger to LaSalle Bank National Association, as trustee for the Registered Holders of GSAMP Trust 2005-HE6, Mortgage Pass-through Certificates, Series 2005-HE6 (BOA), the first mortgage holder, seeking a foreclosure of condominium assessment liens. BOA filed an answer and special defense dated November 1, 2011 (#115.00).

On July 13, 2012 Lake Ridge filed the operative motion for summary judgment as to liability (#124.00). On October 18, 2012 BOA filed it's own cross motion for summary judgment on its special defense (#130.00). The sole issue is whether when a first mortgagee and a condominium association are simultaneously foreclosing their respective security interests in a specific condominium unit, the six months priority conferred on liens for delinquent condominium common charge assessments by Conn. Gen. Stat. § 47-258(b) is

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permanently extinguished if the foreclosing first mortgagee pays the association the then outstanding common charges, late fees, attorney's fees and court costs; or whether the priority applies again if a subsequent common charge delinquency occurs during the pendency of the first mortgagee's foreclosure.

FACTS

The facts underlying this dispute are not contested. At the request of the court the parties have provided a stipulation of facts (#135.00) from which the court finds the following facts material.

The defendant, Vega, is the record owner of the subject property, Unit #28, 1555 North Colony Road, Meriden, Connecticut (Property), a condominium unit and part of the Lake Ridge Condominium Association. The defendant, BOA, instituted an action to foreclose its first mortgage on the Property by writ, summons and complaint returnable on December 22, 2009, bearing docket no. NNH-CV09-6006452-S (Mortgage Foreclosure). The plaintiff, Lake Ridge, is a defendant in the Mortgage Foreclosure action by virtue of its lien for unpaid common charges pursuant to Conn. Gen. Stat. §47-258. The Mortgage Foreclosure action remains pending.

Prior to commencing this action and subsequent to the commencement of the Mortgage Foreclosure action, Lake Ridge initiated a prior foreclosure action for unpaid common charges pursuant to Conn. Gen. Stat. §47-258 against Vega by writ, summons and complaint dated September 28, 2010, bearing docket number NNH-CV10-6015267-S (Prior

Foreclosure). BOA was named as a defendant in the Prior Foreclosure action by virtue of its first mortgage on the Property. On December 20, 2010 the court entered a judgment of strict foreclosure in the Prior Foreclosure action. The court found that the total debt due to the Plaintiff was \$1,680.00. The court found that the priority debt was \$1,260.00. The court awarded \$1,750.00 for attorney's fees plus court costs. The court assigned a law date of February 22, 2011 and subsequent law days in inverse order of the defendants' priorities. On January 20, 2011, a non-lawyer assistant at Hunt, Leibert, Jacobson, P.C., counsel to BOA in the Mortgage Foreclosure and the Prior Foreclosure, requested two figures from Plaintiff's counsel: the redemption figures on behalf of the Vega to redeem on the Vega's law day set for February 22, 2011 and redemption figures on behalf of BOA to redeem on its law day of February 23, 2011. On January 26, 2011, in response to that request, counsel for Lake Ridge sent counsel for BOA a letter wherein it states that "[s]hould [Bank of America] wish to pay in full for the debtor [(Vega)] in the above referenced action the following amounts are due ... \$4,682.20" and "[s]hould [Bank of America] wish to redeem on [its] law day, my client, is due their [sic] statutory priority debt as follows ... \$4,052.20." Lake Ridge's counsel received a check dated January 27, 2011 drawn on an account from Ocwen Loan Servicing LLC in the amount of \$4,682.20, which equaled the amount due on behalf of the Vega. On February 2, 2011 the Lake Ridge filed a satisfaction of judgment with the Court stating that the "Judgment entered by the Court on Plaintiff's Complaint in the [Prior Foreclosure Action] has been fully paid and satisfied by the defendant, Bank of America ...

on behalf of the Defendant, Harry Vega, Jr., on January 31, 2011, prior to his assigned law day." Title to the Property remained and continues to remain vested in Vega.

By writ, summons, and complaint dated June 8, 2011, with a return date of July 5, 2011, the Lake Ridge instituted the instant action against Vega in which BOA is also named as a party defendant to foreclose upon its common charge lien pursuant to Conn. Gen. Stat. §47-258. In this action, Lake Ridge alleges that the monthly condominium common expenses on the Property continues to go unpaid. As noted above, the Mortgage Foreclosure action remains pending. On November 11, 2011, BOA filed an Answer and Special Defense in this Action alleging payment and discharge of the priority portion of the lien and that no new condominium lien prior in right to its mortgage arises.

DISCUSSION

"Summary judgment is a method of resolving litigation when pleadings, affidavits, and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. . . . The motion for summary judgment is designed to eliminate the delay and expense of litigating an issue when there is no real issue to be tried." (Citations omitted.) *Wilson v. New Haven*, 213 Conn. 277, 279, 567 A.2d 829 (1989).

Prior to the filing of the subject motions for summary judgment, Lake Ridge filed a motion to strike BOA's special defense of payment and discharge of the priority portion of the condominium lien, testing the legal sufficiency of BOA's defense. In denying the

motion to strike the court (*Zemetis, J.*) ruled the defense legally sufficient, stating, "The motion to strike addresses whether CGS 47-258 prevents the plaintiff from asserting the 'superpriority' lien, *Linden Cond Assn, Inc. v. McKenna*, 247 Conn 575, 585 (1999), on multiple occasions during the course of a single action by a mortgagee. The Court rejected the argument that a condo assn could initiate a foreclosure on delinquent common expense assessments every six months thereby obtaining statutory 'superpriority', *Hudson House Condo Assn v. Brooks*, 223 Conn. 610, 614-15 (1992). As noted there, the statute limits the priority lien to six months of common expense assessments. Neither that court, nor this, is inclined to question the legislative wisdom of granting a condo assn a 'superpriority' then limiting the same to a six month period. Parties seeking a different statutory scheme must find their relief in the legislature. CGS 47-258 limits the six month 'superpriority' granted to a condo assn to being asserted in an action to enforce either the association's lien or a security interest described in subdivision (2) [a first priority mortgage such as is being foreclosed by the defendant in CV096006452]. As the defendant asserts that the plaintiff has previously satisfied its 'superpriority' lien and this court finds that CGS 47-258 allows the assertion of that lien only once during the pendency of either an action to enforce either the association's lien or a security interest (first priority mortgage), the same would be a valid Special Defense." *Lake Ridge Condominium Association v. Vega Et Al*, Docket No. CV116021568S, judicial district of New Haven (June 25, 2012, *Zemetis, J.*). Lake Ridge is now asserting the same legal arguments it tested in the motion to strike, this time within the

context of a motion for summary judgment. This court agrees with the reasoning and ruling of the court (*Zemetis, J.*) that the defense is valid.

General Statute § 47-258 provides in relevant part, "(a) The association has a statutory lien on a unit for any assessment levied against that unit or fines imposed against its unit owner from the time the assessment or fine becomes delinquent. . . (b) A lien under this section is prior to all other liens and encumbrances on a unit except (1) liens and encumbrances recorded before the recordation of the declaration. . . (2) a first or second security interest on the unit recorded before the date on which the assessment sought to be enforced became delinquent, . . . and (3) liens for real property taxes and other governmental assessments or charges against the unit . . . The lien is also prior to all security interests described in subdivision (2) of this subsection to the extent of (A) an amount equal to the common expense assessments based on the periodic budget adopted by the association pursuant to subsection (a) of section 47-257 which would have become due in the absence of acceleration during the six months immediately preceding institution of an action to enforce either the association's lien or a security interest described in subdivision (2) of this subsection and (B) the association's costs and attorney's fees in enforcing its lien. A lien for any assessment or fine specified in subsection (a) of this section shall have the priority provided for in this subsection in an amount not to exceed the amount specified in subparagraph (A) of this subsection. This subsection does not affect the priority of

mechanics' or materialmen's liens, or the priority of liens for other assessments made by the association."

"This statute is based substantially upon Section 3-116 of the Uniform Common Interest Ownership Act, which Connecticut adopted effective January 1, 1984 (Conn. Gen. Stat. §§ 47-200 to 47-295). Commentators . . . have characterized Section 30-116 as creating a special 'split priority' for common charge assessment liens. That is while the entire lien is prior to all other encumbrances except (a) those which pre-date the declaration of the condominium development, (b) first and second mortgages filed before the common charge delinquency arose, and (c) taxes and other governmental assessments, there is a further, 'super priority' provided to a portion of the lien, even with respect to senior first and second mortgages."

"The Official Comment to Section 3-116 of the Uniform Act recognizes the unique status given to the common charge assessment lien: 'A significant departure from existing practice, the 6 months priority for the assessment lien strikes an equitable balance between the need to enforce collection of unpaid assessments and the obvious necessity for protecting the priority of the security interests of lenders.' 7 Unif. Laws Anno. at 354."

"What this statute does, by granting a six months priority to a condo association, is to accommodate the competing needs of a condo association faced with delinquent assessments, and a lender simultaneously seeking to protect the priority of its security interest."

"If the plaintiff's interpretation of this statute were to prevail, the six month limitation on the priority would be ineffectual, because after the original delinquency is paid in full, and the foreclosure is withdrawn, a new priority would arise as soon as there is any further delinquency, effectually extending the six months indefinitely, even though the defendant's foreclosure action is still pending."

"Such an interpretation and result would be a distortion of the statute and a subversion of the policy underlying it. 'A statute should be construed so that no word, phrase, or clause will be rendered meaningless.' *Verrastro v. Silversten*, 188 Conn. 213, 221 (1982) (citations omitted). The facts that this court looks to in construing a statute include 'its legislative history, its language, the purpose it is to serve, and the circumstances surrounding its enactment.' *Verrastro*, supra, p. 221 (citations omitted). See also *Fahy v. Fahy*, 227 Conn. 505, 512 (1993)."

"The defendant throughout has been pursuing its own first mortgage foreclosure. The statute provides that the priority is limited to 'the six months immediately preceding institution of an action to enforce either the association's lien or a security interest' (referring to a first mortgage lien prior to the association lien), such as the defendant's in this case. Therefore, if the plaintiff were allowed to create a new six-month priority by starting a new foreclosure action after the defendant has already satisfied one six month delinquency, and while the defendant's foreclosure action is still pending, the defendant would have to absorb

more than one priority during the pendency of its foreclosure, which does violence to the statutory language.

In construing a statute, 'we follow the 'golden rule of statutory interpretation' . . . that the legislature is presumed to have intended a reasonable, just and constitutional result.' (Emphasis added.) *Sanzone v. Board of Police Commissioners*, 219 Conn. 179, 187, 592 A.2d 912 (1991)."

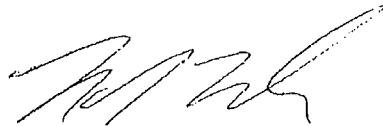
"Furthermore, if the plaintiff's position is upheld, it would deter first mortgage lenders from paying condo associations some portion of the delinquency. As stated in the Official Comment of Section 3-116 of the Uniform Common Interest Ownership Act: 'To ensure prompt and efficient enforcement of the association's lien for unpaid assessments, such liens should enjoy statutory priority over most other liens. . . As a practical matter, secured lenders will most likely pay the six months assessments demanded by the association rather than having the association foreclose on the unit.' 7 Uniform Laws Anno. at 354."

"Why would any secured lender pay off the priority amount if, by so doing, a new priority was created. Instead, the secured lender would wait as long as possible to avoid the very thing that the plaintiff seeks to obtain in this case. They would be better off waiting until their law day to redeem, thereby frustrating the very propose of the statute." *River Glen Condominium Assoc. v. Woulfe*, Superior Court, judicial district of Litchfield, Ct.Sup. 3900, 14 CLR 101 (April 120 1995, *Walsh, J.*).

The court finds the facts of the instant case analogous to those of the *River Glen* case and is persuaded by its reasoning. Because BOA's mortgage foreclosure has been pending continuously and because BOA has already satisfied the priority portion of Lake Ridge's condominium liens during the pendency of the mortgage foreclosure the court finds that the six month priority portion of the lien has been satisfied and discharged by operation of the provisions of General Statute § 47-258(b).

CONCLUSION

For the foregoing reasons the court finds that no genuine issues as to material facts exist and that judgment should enter on behalf of BOA on its special defense. Lake Ridge's motion for summary judgment (#124.00) is therefore ordered DENIED. BOA's cross motion for summary judgment (#130.00) is ordered GRANTED.



Michael G. Maronich, Judge

EXHIBIT B

Proposed Revision to Subsection 47258(b) of the Common Interest Ownership Act

(changes are underlined)

(b) A lien under this section is prior to all other liens and encumbrances on a unit except

(1) liens and encumbrances recorded before the recordation of the declaration and, in a cooperative, liens and encumbrances which the association creates, assumes or takes subject to,

(2) a first or second security interest on the unit recorded before the date on which the assessment sought to be enforced became delinquent, or, in a cooperative, a first or second security interest encumbering only the unit owner's interest and perfected before the date on which the assessment sought to be enforced became delinquent, and

(3) liens for real property taxes and other governmental assessments or charges against the unit or cooperative.

In each and every action brought to foreclose a lien under this section or a security interest described in subdivision (2) of this subsection, the lien is also prior to all security interests described in subdivision (2) of this subsection to the extent of

(A) an amount equal to the common expense assessments based on the periodic budget adopted by the association pursuant to subsection (a) of section 47-257 which would have become due in the absence of acceleration during the six months immediately preceding institution of an action to enforce either the association's lien or a security interest described in subdivision (2) of this subsection and

(B) the association's costs and attorney's fees in enforcing its lien.

A lien for any assessment or fine specified in subsection (a) of this section shall have the priority provided for in this subsection in an amount not to exceed the amount specified in subparagraph (A) of this subsection. This subsection does not affect the priority of mechanics' or materialmen's liens or the priority of liens for other assessments made by the association.

